NO. 21973

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ONALD LANNON,

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in all counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that William Roy Mougey and Katherine Mougey, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States approximately 198 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported said marihuana contrary to law, and also charged that appellant and Mrs. Donald Lannon knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].[1/]

Count Two alleged that William Roy Mougey and Katherine Mougey, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 198 pounds of marihuana, which marihuana had been imported into the United States contrary to law, and also charged that appellant and Mrs. Donald Lannon knowingly aided, abetted, counseled, induced, and procured the commission of that offense. [C.T. 3].

Jury trial of appellant commenced on January 24, 1967, before United States District Judge Fred Kunzel [R.T. 31-32].[2/] Appellant was found guilty as charged upon each count on January 26, 1967 [C.T. 44].

1/ "C.T." refers to the Clerk's Transcript.

2/ "R.T." refers to the Reporter's Transcript of Appeal.

Thereafter, on February 27, 1967, appellant was committed to the custody of the Attorney General for eight years upon each count, to run concurrently and also to run concurrently with the sentence in another case [C.T. 45]. Appellant filed a timely notice of appeal [C.T. 45-a].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"1. Prejudicial error resulted from the trial court's refusal to give a requested instruction that failure of the prosecution to call witnesses available to maintain its burden of proof gave rise to a presumption that these witnesses would testify against the government.

"2. Appellant was prejudiced by the trial court's failure to give requested instructions that he could not be convicted on the uncorroborated testimony of an accomplice."

[Appellant's Opening Brief, p. 4].

IV

STATEMENT OF THE FACTS

On April 8, 1966, appellant took a trip to Tijuana, Mexico, in his own vehicle, accompanied by William Mougey, Ed Herreras, Mrs. Lannon, and a girl named Jackie. Lannon was known to Mougey as "Donald the Barber." [R.T. 34, 40, 57, 154].

The vehicle was stopped in San Diego by a San Diego Police motorcycle officer, who had observed appellant driving in a southerly direction at

a speed of 67 miles per hour. The group subsequently proceeded to Tijuana, where appellant separated from Herreras, Mougey, and Jackie. He later rejoined them, drove them to a side street, and said, "This is the car you are to drive back." Mougey and Jackie drove the car back to appellant's apartment, and appellant paid Mougey $500 [R.T. 41, 122-23]. Mougey did not see any marihuana during the trip [R.T. 87].

On the following day, Mougey told appellant that "if he had any more trips, I would be glad to drive again; that it was an easy $500." [R.T. 41-42].

On approximately April 12, 1966, appellant asked Mougey whether he wanted to pick up another car. Mougey agreed to do so [R.T. 43]. On April 22, appellant told Mougey to go to Tijuana, pick up the car across the street from the Caliente racetrack, and cross the border before 11 o'clock. He said that it was the same car that Mougey drove on the last occasion, that it was parked in a motel across from the racetrack, that the key was in the ashtray, and that Mougey would be paid $500 [R.T. 44].

Mougey went to Tijuana, got the car, headed for Los Angeles, and was stopped at the border at San Ysidro, California, and arrested for smuggling [R.T. 44-45, 126]. The vehicle contained 90 packages located underneath the rear seat, in back of the rear seat, in panels, and in spot-welded compartments underneath the fenders. The compartments were of a type not normally found in an automobile [R.T. 127-28].

It was stipulated that the packages contained marihuana [R.T. 68-69, 129]. The marihuana weighed 198 pounds and had a selling price of

approximately $3256 to $3520 in Mexico [R.T. 154].[3/]

Under questioning by an officer, Mougey related a story that was inconsistent with his later testimony at trial [R.T. 53].

The vehicle in which the marihuana was found had been sold on March 31, 1966, to a man using the name of "Jim L. Wilson." "Wilson" furnished a false address [R.T. 117-18, 127, 161-62]. Appellant was present when the vehicle was purchased. When "Wilson" was asked questions in connection with the sales negotiations, "he would always look to the other gentleman" (appellant) before answering, "obviously for approval . . . ." Both men appeared to be nervous when tape recording of the negotiations commenced [R.T. 117-19].

Mougey's arrest occurred on a Friday night. On the following Monday, he was released on $10,000 bail. Appellant paid the necessary cash for Mougey's bail [R.T. 45-46].

On April 27, 1966, Mougey made arrangements to meet appellant at the Sir Knight cocktail lounge in Van Nuys, a suburb of Los Angeles [R.T. 47, 140]. Mougey arrived first and ordered a drink. While he was sitting at the bar, some other men came in, using the front door and the back door. They acted so strangely that the bartender and another employee decided to call the police [R.T. 48, 134-35].

3/ The witness testified that the approximate selling price was between $37 and $40 per kilo and that one kilo equalled 2-1/4 pounds [R.T. 154].

A police officer arrived and found appellant, Mougey, "John Herrera," and Jerry Lynn in a vehicle at the rear of the cocktail lounge. In the meantime, Mougey had left the inside of the lounge at Jerry Lynn's request and walked to the vehicle, where he was beaten by appellant, Ed Herreras, and Lynn. Appellant accused Mougey of turning him in to the police and said that he would kill Mougey. He mentioned that there were some shovels in the trunk. Lynn said that if they could not get to Mougey, that he had a three-year old daughter. Appellant said that he would leave it up to Herreras as to whether Mougey lived or died. Herreras said to let him go. Then the police officer arrived [R.T. 48-50, 140-41].

The officer noticed no bruises, but he did not examine Mougey's body. Mougey appeared to be "upset or nervous about something." Appellant told the officer that his name was "Donald James Barber." [R.T. 141-42, 144-45].

V

ARGUMENT

A. REFUSAL TO GIVE AN INSTRUCTION REGARDING FAILURE TO CALL WITNESSES DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Court should have given an instruction to the effect that failure of the prosecution to call available witnesses "to maintain its burden of proof" results in a presumption that the witnesses would testify against the prosecution (Appellant's Opening Brief, p. 4).

Appellant refers to John Burnham, Mrs. Burnham, and Katherine Mougey,

all of whom were present during portions of the trial [R.T. 204-05].

The rule proposed by appellant does not apply where the witnesses are equally available to both parties.

Wagner v. United States, 264 F.2d 524, 531 (9th Cir. 1959), cert. denied, 360 U. S. 936 (1959);

Arellanes v. United States, 302 F.2d 603, 608 (9th Cir. 1962), cert. denied, 371 U. S. 930 (1962).

Manual on Jury Instruction in Federal Criminal Cases, 33 F.R.D. 602 (citing numerous decisions).

> "Where a witness is equally available to both parties no inference should be drawn from the failure to produce such a witness."

Wagner, supra, at p. 531.

Since the witnesses in question were present in the courtroom during portions of the trial, no inference should be drawn from the failure by either party to call them as witnesses.

In Bradford v. United States, 271 F.2d 58, 65 (9th Cir. 1959), this Court noted that there are many objections that could be leveled at a proposed instruction to the effect that failure to call a witness gives rise to an inference that the testimony would be unfavorable. Although the various objections are not listed in the opinion, some may be readily discerned. A witness may not be called because his testimony is saved for rebuttal purposes; because he is hostile; because he intends to commit perjury; because he is subject to

impeachment; because he intends to rely upon the privilege against self-incrimination or other privilege; because he is mentally unstable; because his testimony may tend to reveal the identity of a confidential informant whose life may be imperiled; because he claims lack of memory; because it would cost hundreds of dollars to transport him to the scene of trial; or for many other valid reasons. The rule proposed by appellant would be more likely to accomplish injustice than justice.

Appellant cites Yaw v. United States, 228 F. 2d 382 (9th Cir. 1955), which contains dictum stating a rule that has been modified by the later decisions in Wagner and Arellanes, supra.

Furthermore, in Yaw, the Court emphasized the fact that the testimony by the witness could not incriminate him, since ha had plead guilty (at p. 383). In the instant case, the possible witnesses in question had been indicated in connection with the same crime that was the subject of the trial [R.T. 203], and there is no evidence that their testimony would not have tended to incriminate themselves. 4/

4/ It also might be noted that the Yaw dictum refers to a "presumption" and cites, as sole authority, Wigmore On Evidence, Sections 286-90. In Wigmore's discussion of the subject, he refers to an "inference," not a presumption.

Wigmore on Evidence, 3rd Ed., Vol. 2, Sections 286-90. However, appellant requested an instruction to the effect that a presumption was created [C.T. 32].

Appellant also cites Graves v. United States, 150 U. S. 118 (1893); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); and United States v. Jackson, 257 F.2d 41 (3rd Cir. 1958). Graves and Scanlon refer to witnesses whose availability is "peculiarly" within the power of one party.

Graves, supra, at p. 121;

Scanlon, supra, at p. 392.

In the instant case, the witnesses were available to both parties, not peculiarly available to only one party.

Jackson, supra, indicates (at p. 44) that where the potential witness is equally available to both parties, failure to produce is open to an inference against both parties. Under this view, each side might be entitled to an "inference" instruction (although appellant requested more by employing the "presumption" term), so failure to give these counter-balancing instructions would not result in prejudice to appellant.

B. ERROR WAS NOT COMMITTED BY FAILURE TO INSTRUCT THE JURY THAT UNCORROBORATED TESTIMONY OF AN ACCOMPLICE WOULD BE INSUFFICIENT TO CONVICT.

Appellant argues that the trial Court should have instructed the jury that the uncorroborated testimony of an accomplice would be insufficient to sustain a conviction.

However, the uncorroborated testimony of an accomplice is sufficient to sustain a conviction.

Caminetti v. United States, 242 U. S.470, 495 (1917);

Grant v. United States, 371 F.2d 400, 401 (9th Cir. 1967);

Cheadle v. United States, 370 F.2d 314, 315 (9th Cir. 1966);

Torres v. United States, 353 F.2d 734, 735 (9th Cir. 1965);

Quiles v. United States, 344 F.2d 490, 494 (9th Cir. 1965), cert. denied, 382 U.S. 992 (1966);

Ellis v. United States, 321 F.2d 931, 933 (9th Cir. 1963);

Lyda v. United States, 321 F.2d 788, 794 (9th Cir. 1963);

Proffit v. United States, 316 F.2d 705, 707 (9th Cir. 1963);

White v. United States, 315 F.2d 113, 115 (9th Cir. 1963), cert. denied, 375 U.S. 821 (1963);

Bible v. United States, 314 F.2d 106, 108 (9th Cir. 1963), cert. denied, 375 U. S. 862 (1963);

Williams v. United States, 308 F.2d 664, 666 (9th Cir. 1962);

Toles v. United States, 308 F.2d 590, 592 (9th Cir. 1962), cert. denied, 375 U. S. 836 (1963);

Marcella v. United States, 285 F.2d 322, 323-24 (9th Cir. 1960), cert. denied, 366 U. S. 911 (1961);

Ambrose v. United States, 280 F.2d 766, 768, n. 8 (9th Cir. 1960);

Audett v. United States, 265 F.2d 837, 846-48 (9th Cir. 1959), cert. denied, 361 U. S. 815 (1959);

Cowell v. United States, 259 F.2d 660, 661 (9th Cir. 1958);

Doherty v. United States, 230 F.2d 605 (9th Cir. 1956);

Catrino v. United States, 176 F.2d 884, 889 (9th Cir. 1949);

Todorow v. United States, 173 F.2d 439, 444 (9th Cir. 1949), cert. denied, 337 U. S. 925 (1949);

Pina v. United States, 165 F.2d 890, 892 (9th Cir. 1948);

Westenrider v. United States, 134 F.2d 772, 774 (9th Cir. 1943);

Hass v. United States, 31 F. 2d 13, 14 (9th Cir. 1929), cert. denied, 279 U. S. 865 (1929).

Furthermore, the testimony of the accomplice was corroborated by many other witnesses. The accomplice testified that appellant exercised dominion over the vehicle that was involved in the smuggling [R.T. 41, 44]. Lynn Drake and Glen Stewart testified concerning appellant's participation in the purchase of the same vehicle, which was purchased under the name of "Jim L. Wilson" with a false address, only 8 days before appellant told the accomplice to drive the vehicle for the first trip. At the time of the purchase of the vehicle, the ostensible purchaser, "Wilson," was always looking at appellant, obviously for approval, before answering questions. Appellant and "Wilson" both appeared to be nervous when tape recording of the sales negotiations commenced [R.T. 41-42, 57, 115-18, 125-27, 161-65]. Some of the smuggling compartments were spot-welded underneath the fenders of the vehicle.

The accomplice, Mougey, testified that a speeding ticket was received during the April 8 trip to Tijuana with appellant driving a 1966 Ford. This testimony was corroborated by Officer Quidley, who testified that he gave

appellant a speeding ticket on April 8 in San Diego. Appellant was driving a 1966 Ford southbound at high speed [R.T. 40-41, 122-24].

Mougey testified that appellant was known to him as "Donald the Barber." Officer Williams testified that appellant told him that his name was "Donald James Barber." [R.T. 34, 139-41].

Mougey testified that appellant paid the money for Mougey's bail. This testimony was corroborated by the testimony of the bail bond agent, Juana Martinez Goldstein [R.T. 46, 146-50].

Mougey's account of the beating in Van Nuys was partially corroborated by the testimony of Judith Hopkins and Officer Williams. Miss Hopkins testified that the acquaintances of Mougey entered the cocktail lounge through the front door and rear door, acting so strangely that she and the bartender decided to call the police. Officer Williams testified that Mougey appeared to be upset or nervous and that the persons in the vehicle were appellant, Mougey, Jerry Lynn, and "John Herrera" (Mougey testified that he was beaten on that occasion by appellant, Jerry Lynn, and Ed Herreras) [R.T. 47-48, 133-37, 140-43].

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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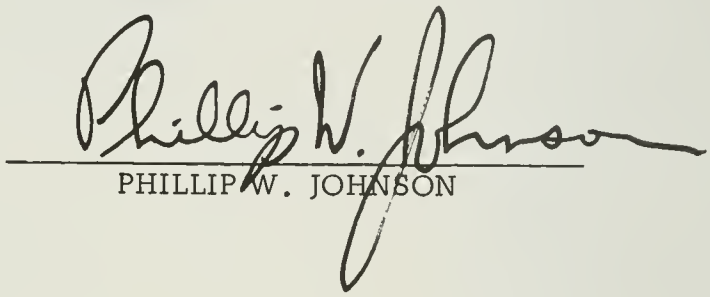
CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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